

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BILLY RAY JOHNSON,

Petitioner,

v.

STUART SHERMAN,

Respondent.

Case No. 1:21-cv-01313-DAD-EPG-HC

FINDINGS AND RECOMMENDATION
RECOMMENDING DENIAL OF FIRST
AMENDED PETITION FOR WRIT OF
HABEAS CORPUS

(ECF No. 8)

Petitioner Billy Ray Johnson is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed herein, the undersigned recommends denial of the first amended petition for writ of habeas corpus.

I.

BACKGROUND

On April 21, 2015, Petitioner was convicted by a jury in the Kern County Superior Court of twenty-four counts, including, *inter alia*, multiple counts of forcible rape, robbery, and burglary. The jury found true various special allegations regarding firearms. (8 CT¹ 1868–1944.) Petitioner was sentenced to multiple life, or life-equivalent, terms. (8 CT 2055.) On July 11, 2019, the California Court of Appeal, Fifth Appellate District “remand[ed] for the trial court to exercise its discretion to consider striking any firearm enhancements imposed pursuant to Penal

¹ “CT” refers to the Clerk’s Transcript on Appeal lodged by Respondent on October 25, 2021. (ECF No. 13.)

Code sections 12022.5, subdivision (c) or 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, §§ 1, 2, eff. Jan. 1, 2018),” but affirmed the judgment “[i]n all other respects.” People v. Johnson, No. F071640, 2019 WL 3025299, at *16 (Cal. Ct. App. July 11, 2019). On August 6, 2019, the Fifth Appellate District denied the petition for rehearing. (LD² 81.) On October 23, 2019, the California Supreme Court denied Petitioner’s petition for review. (LD 82.)

Upon remand, the trial court held a hearing, exercised its discretion to not strike the firearm enhancements, and affirmed Petitioner’s prior sentence. On May 21, 2021, the California Court of Appeal, Fifth Appellate District affirmed. People v. Johnson, No. F080848, 2021 WL 2023582 (Cal. Ct. App. May 21, 2021).

Petitioner then filed a federal habeas petition. (ECF No. 1.) As the petition was not signed under penalty of perjury, the Court granted Petitioner leave to file an amended petition. (ECF No. 4.) Petitioner filed a first amended petition (“FAP”) raising the following claims for relief: (1) the trial court’s denial of Petitioner’s request to access the source code utilized to run the software that analyzed the DNA evidence violated his rights to confrontation, compulsory process, and due process; (2) the trial court’s exclusion of Petitioner’s proffered expert testimony violated his rights to confrontation, compulsory process, and due process; (3) the trial court’s failure to grant a mistrial after discharge of a juror violated Petitioner’s statutory and Fifth and Sixth Amendment rights; and (4) the trial court erroneously denied Petitioner’s Batson/Wheeler motion. (ECF No. 8.) Respondent filed an answer, and Petitioner filed a traverse. (ECF Nos. 16, 23.)

II.

STATEMENT OF FACTS³

This case revolves around four burglaries and sexual assaults that occurred between late June and late August 2013.⁴ Appellant was ultimately charged and convicted with perpetrating all four attacks and appeals from those convictions. Given the variety of issues raised by appellant, we will first generally recount the

² “LD” refers to the documents lodged by Respondent on October 25, 2021. (ECF Nos. 13–15.)

³ The Court relies on the California Court of Appeal’s July 11, 2019 opinion for this summary of the facts of the crime and the procedural history of the case. See Vasquez v. Kirkland, 572 F.3d 1029, 1031 n.1 (9th Cir. 2009).

⁴ Subsequent references to dates are to dates in the year 2013, unless otherwise stated.

1 events, including relevant evidence from the trial, before generally recounting
2 relevant aspects of how the trial unfolded. Additional factual detail will be
provided as each relevant legal issue is discussed.

3 *The Assaults*

4 The first incident occurred in the early morning on July 1, and involved two
5 young women. According to one of the women, she went to bed around 2:00 a.m.
6 and woke up to find a man standing near a window in her room. She described the
man as around six feet tall, and black with hazel brown eyes. He was wearing a
7 ski mask, a dark sweatshirt, and gloves with the fingers cut off. He possessed a
black gun.

8 The man told the woman to look away and cover her eyes; he placed a pillow case
9 over her head and told her he would kill the girl in the other room if she was not
quiet. The man removed the woman's bra and told her he was going to rape her.
He then put the gun to the woman's head and cocked it.

10 At this point the woman grabbed for the gun and yelled out. The man responded
11 by hitting the woman in the head several times. The second woman heard the
yelling and came toward the room from where she had been sleeping. The man
12 struck her with the gun and slammed her against the wall, telling her to shut up or
he would kill her. During this time, the first woman ran from the apartment. The
13 man gave chase. The second woman locked the door and tried to call 911. The
first woman ultimately reached her cousin's apartment, where the police were
14 called. Upon returning to the apartment, the first woman noticed her cell phone
was missing.

15 The police determined the man likely entered the apartment through a bedroom
16 window and found the screen had been removed from a window that was found
open. They located a single shoe print at the scene. A black and white pair of Nike
17 shoes later recovered from appellant's residence could not be excluded as a
match, although there were insufficient distinguishing features to identify them as
18 the shoes that left the print.

19 The women first called 911 at 3:29 a.m., and the police estimated the crime
20 occurred about 15 minutes before the call. Analysis of appellant's cell phone
records showed he was speaking with his girlfriend until 3:00 a.m., stopped using
21 the phone for a while, then resumed texting his girlfriend at 4:00 a.m. His phone
was utilizing cell towers that covered both his residence and the scene of the
crime. Apparently, no DNA from this crime was obtained and tested.

22 The second incident occurred on July 18, around 5:00 a.m. The woman attacked
23 in this incident said her husband left for work around 4:45 a.m. She fell back
asleep after he left, only to wake up with a gloved hand over her mouth. Her
24 attacker was a black male slightly taller than 5 feet 11 inches with a deep voice
who smelled like cigarettes. He wore a black ski mask, black jean shorts, a
sweater, black shoes with white markings, and had a black backpack.

25 The man instructed the woman to go to the living room and get on her knees. He
26 covered her head with a blanket. He told her not to look at him, not to scream, and
to think of her daughter. He used a purse strap to tie her hands. The man then
27 asked for money and began searching the apartment. He told the woman he knew
her, called her by name, and said he'd been watching her. He removed her
28 clothing and touched her breasts and body. The man then had intercourse with the

1 woman, using a condom. After he finished, he took the woman to the bathroom
2 and washed her.

3 The man took the woman back to the living room, her face covered with her shirt,
4 and sat down next to her. He asked her about her relationship and whether she
5 would tell her husband what had happened, and told her not to call the police. He
6 stated he would take her cell phone, but told her he would hide it instead when the
7 woman said there were special pictures of her daughter on the phone. Eventually,
8 the man left through the kitchen window, and around 6:00 a.m., the woman called
9 911.

10 The police investigation found a window screen on the ground and that the
11 bathroom window could be opened from the outside, even if locked. The rag used
12 to wash the woman could not be found, but an unknown phone cord, the purse
13 strap used to bind the woman, and the woman's cell phone along with other items
14 were all collected and analyzed. The police also found shoe tracks in the dirt
15 behind the woman's apartment. These prints were consistent in tread to a pair of
16 black Reebok shoes found at appellant's residence.

17 The review of appellant's cell phone usage showed activity up to about 1:15 a.m.
18 the morning of the attack and then a break until 5:57 a.m., when appellant began
19 calling his girlfriend. The activity around 1:00 a.m. occurred near appellant's
20 residence. The call at 5:57 a.m., however, utilized the cell tower covering the
21 victim's apartment. In activity after that time, appellant's cell phone travelled
22 back to the cell tower covering his apartment, arriving there by 6:17 a.m. Police
23 reviewed four months of cell phone records and found this was the only time in
24 that period appellant's cell phone connected with the tower covering the woman's
25 apartment.

26 The police also attempted to conduct DNA analyses on several samples including
27 the purse strap, telephone cord, and cell phone collected, along with a sample
28 taken from the kitchen window. These samples all had multiple contributors and
either could not be manually interpreted or could not be matched to a known
potential contributor. The police, therefore, utilized a software program called
TrueAllele to obtain what are known as match statistics for each sample. These
statistics determine the probability that a known DNA profile is a contributor to
the mixture when compared to a random person from various ethnic populations.
The software is based on known mathematical models based on an algorithmic
concept known as the Markov chain Monte Carlo, but the actual analysis it
conducts is not publicly known and its source code is not made available for
review. Its results have been subjected to peer review analysis and its program
validated in certain controlled studies.

Two experts tested the DNA used in appellant's case. The first was Dr. Mark
Perlin, the inventor of TrueAllele and a hired expert in the case. The second was
Garett Sugimoto, a criminalist trained to use the TrueAllele software with the
Kern Regional Crime Laboratory. Both sets of results were presented at trial.

According to Dr. Perlin, a match between appellant and one of the contributors in
the sample was 43 times more probable than coincident for the purse strap, 34,000
times more probable for the telephone cord, 41,000 times more probable for the
cellphone, and 10 times more probable for the kitchen window. In comparison,
when looking at whether the woman was a contributor on the purse strap, the
results were five quintillion times more probable than coincident. Of all the

1 samples from this incident, Dr. Perlin found three supported appellant as a
2 contributor, nine supported exclusion, and one was inconclusive.

3 Sugimoto utilized a slightly different methodology. If the match statistic
4 generated was greater than 10,000, he classified the result as "cannot exclude." If
5 the result was between negative 10,000 and positive 10,000, he classified the
6 result as "inconclusive." If the score was less than negative 10,000, he classified it
7 as "an exclusion." According to Sugimoto, appellant could not be excluded as a
8 contributor to the telephone cord and cellphone samples. In these examples,
9 appellant's score was between 39,000 times and 79,000 times more probable than
10 coincident, depending on the ethnic group considered, for the telephone cord, and
11 between 12,000 times and 22,000 times more probable for the cellphone sample.
12 Sugimoto found the purse strap and kitchen window samples inconclusive.
13 Appellant was excluded from the other samples reviewed.

14 The third incident, involving a woman and her children, occurred on August 1.
15 One early morning prior to the event, the woman's children saw a light shining
16 through the window and someone attempting to open the window. In response,
17 the family put wooden dowels in all the window tracks. Two days before the
18 assault, the woman found all the dowels removed and around \$150 missing. The
19 apartment manager responded by placing screw-type locking devices on the
20 window tracks.

21 The morning of the attack, the woman got up for work at 4:00 a.m. When she
22 opened the front door to leave, a tall black man smelling of cigarettes pushed her
23 back into the apartment. He was wearing dark blue gloves, a black mask, a black
24 sweater with a hood, red athletic shoes, and had a black backpack.

25 The man used tape from his backpack to cover her eyes and mouth. He used
26 plastic ties to bind her hands and feet and placed a rag in her mouth. At one point
27 during the assault, the woman told him she was pregnant. The man responded by
28 kicking her in the back before placing a pillow under her head and stomach. After
moving her several times, the man eventually ripped the woman's bra off and
rubbed her breasts before removing her pants and engaging in intercourse. He told
the woman not to resist or something would happen to her children. After he
ejaculated, the man used a wet towel to clean the woman.

The man also attacked the children in the home. Two of the young girls were
taken into the room with the woman, having been stripped naked. A third was
brought to the room with the woman but remained clothed. The man used plastic
ties to bind the children as well, and placed clothing in their mouths. He touched
the naked breasts of one of the children. During the time he was assaulting the
children, the woman heard the man turn on the shower.

When he finished the assaults, the man placed all four people on a bed, removed
their bindings with a knife, and told them not to look at him. He collected and
took those bindings with him along with the towel used to clean up. He then
covered them with a blanket and said he was sorry for what had happened. He
told the woman not to call the police or her children would pay for it, took her cell
phone, and left. The woman immediately dressed, ran to a neighbor's apartment,
and called the police.

The 911 call was received at 6:03 a.m., and the police estimated the crime
occurred about 40 minutes earlier. A review of appellant's phone records showed
no activity from 8:30 p.m. on July 31, until 4:27 a.m. on August 1, when appellant

1 received a text message from his girlfriend. Appellant responded at 5:25 a.m., and
2 called her several times until around 7:06 a.m. The cell phone utilized a tower that
3 covered both appellant's residence and the woman's apartment at all times. The
4 next day, appellant began reviewing web pages discussing the recent attacks.

5 DNA samples were again collected from the crime scene. None of these samples
6 resulted in a manual analysis match to appellant, but three showed potential
7 matches through the TrueAllele program. Dr. Perlin found two stains on the
8 woman's pants that showed appellant was 1.78 million times and 5.44 million
9 times more likely than coincident to be the contributor. A stain on the woman's
10 shirt resulted in a 740 million times more likely than coincident finding. In
11 comparison, the woman's boyfriend's DNA was also found in these samples at
12 respective probabilities of 25, 263, and 272 quadrillion times more likely than
13 coincident. A further nine results reviewed by Dr. Perlin presented results that
14 excluded appellant as a donor. Sugimoto's analysis of the three samples
15 implicating appellant showed results between 2.3 and 12 million, 426,000 and 2.1
16 million, and 43 and 100 million times more likely than coincident, respectively.

17 The fourth incident, involving a woman and her daughter, occurred on August 19.
18 The woman involved went to bed around 11:30 p.m. on August 18, and awoke to
19 a man in a black hooded sweater and a black mask holding a gun. She could not
20 see his skin. She thought from his voice that he was black, and, at one point, he
21 asked what race she thought he was. She testified she responded "Hispanic," to
22 which the man said, "yeah right, like I would be." Her daughter got a better view
23 of the attacker and said he was a black man wearing black gloves, khaki shorts, a
24 puffy snow jacket over an orange shirt, and red shoes with green on them.

25 The man placed tape over the woman's eyes and around her head. He bound her
26 hands behind her back with zip ties. He later did the same to the woman's
27 daughter. He asked for money and the woman told him about \$5,000 cash in the
28 apartment that the man ultimately took. The man asked about phones in the house
and took the woman's cell phone.

The man again sexually assaulted the woman involved. He removed her tank top
with a knife. He then removed her pants and made her lay on a towel. He kissed
her breasts and touched her genitals. He used a condom when he had intercourse
with her. When he was done, he took the woman to the bathroom, put her in a tub
of water, and cleaned her.

During this time, the daughter freed herself and found a phone the man had not
known about. She called 911. When the man saw her, she threw down the phone
and fled the apartment. The man fled around this time, apparently taking the
towel. When he did, the woman called 911 as well. The first call to 911 occurred
at 3:43 a.m.

The police obtained several items of evidence from the apartment, including an
ice chest, multiple zip ties, duct tape, and shoe prints. They attempted to analyze
finger prints found on the cooler but obtained no matches. They ultimately found
the cell phone in a field near the apartments. A red pair of Nike shoes obtained
from appellant's apartment contained a tread deemed similar to a shoe print found
on the kitchen counter in the apartment.

Unlike the other crimes, there was no cell phone data to review because
appellant's pre-paid phone had been disconnected for non-payment on August 14.
On August 19, at 4:06 p.m., appellant's phone was reconnected after a payment

1 was made. Appellant's internet search history showed he searched for articles
2 about the recent assaults on August 20, 22, 23, 24, and 31, as well as September 1.

3 The police later determined that appellant's girlfriend bought a used 1994
4 Chevrolet Caprice at 11:10 a.m. on August 19, and paid \$2,250 in cash. She also
5 posted a message a few days later on Facebook suggesting a participant in the
6 conversation was not a "true criminal like Billy." Appellant responded to this
7 message, saying "yeah, but when da money come in, what you be saying? Can
8 you buy me a new car? Yeah."

9 DNA evidence was collected from several items. One of these was a zip tie found
10 on the roadway near the apartment. The DNA on this item was sufficient for a
11 manual interpretation and could be utilized in a CODIS search. This search
12 resulted in a CODIS hit for the DNA. A reference sample from appellant was then
13 requested and Sugimoto determined the DNA from this sample was consistent
14 with DNA on the zip tie. Appellant's own expert also conducted a manual review
15 of the DNA from the zip tie and concluded "that Mr. Johnson was present" as the
16 major contributor to that sample.⁵

17 Samples were also run through the TrueAllele software. Dr. Perlin found two
18 results included appellant as a contributor, while 10 results excluded appellant.
19 The two inclusive results were from DNA on the bathtub handle, which showed
20 results of 550 times more likely than coincident, and on the zip tie found on the
21 road, with results of 211 quintillion times more likely than coincident. Sugimoto
22 found the bathtub handle DNA inconclusive but the zip-tie DNA inclusive, with a
23 range of 170 quintillion to 15 sextillion times more likely than coincident.

24 *Appellant's Arrest and Subsequent Conduct*

25 On August 28, appellant was found sitting in the driver seat of a running 1994
26 Chevrolet Caprice. He was arrested for driving on a suspended license, and police
27 found brass knuckles and two condoms when searching the car. Appellant said he
28 had bought the car with cash earlier and the brass knuckles were inside at the
time. Appellant said he and his girlfriend were not working but had been able to
save for the car. As he was being transported to jail, the arresting officer reported
that appellant spontaneously stated, "I told you that this had to do with more than
just brass knuckles" and "I have too many girls to be out here raping people." The
arresting officer described appellant as 6 feet 1 inch tall, and 190 pounds. He said
appellant smelled of stale cigarettes and as if he had not showered in days.

Following his arrest, appellant was placed under police surveillance. On October
13, he was spotted outside at 2:40 a.m. and again around 3:45 a.m., wearing a
black hooded sweatshirt with the hood up and dark pants. The police placed high-
beam headlights on appellant and he raised his hands and yelled. They then lost
sight of him until he returned home at 6:54 a.m. A later search of appellant's
phone recovered several videos from that morning, recorded between about 2:00
a.m. and about 6:00 a.m. These included a video showing someone searching next
to a doormat and plant at the apartment of a woman named Teresa, and a video
recording a different naked woman taken through her bedroom window.

On October 14, police saw appellant enter the passenger side of a maroon
Chevrolet Caprice driven by his girlfriend shortly after and near where officers

⁵ Appellant's expert also found she could not exclude appellant as a minor contributor to sperm cell fractions on
shirt and pant stains from one of the other attacks.

1 allege a black male fired several shots in front of an apartment complex. Police
2 tailed the Caprice and saw an object thrown from the passenger side window. The
3 car was stopped, and appellant was arrested. His girlfriend was released.
4 Appellant later called his girlfriend from the jail and gave what police believed
5 was a coded message to go retrieve the gun used in the shooting. Police returned
6 to where they believed the gun had been tossed and found appellant's girlfriend
7 there. They detained her, searched the area, and found a gun that was later
8 determined to be involved in the shooting.

9 Subsequent searches of appellant's residence separately located a black ski mask
10 and a black hooded pullover sweatshirt kept in a plastic trash bag in appellant's
11 backyard, along with several items of clothing similar to those described by the
12 victims, and a group of white zip ties in appellant's residence. Police also learned
13 that appellant was conversing with a 14-year-old girl on Facebook in April and
14 September. In those conversations he told the girl he found her "hella sexy" and
15 wondered why "[e]veryone trips on age" when she did not want to speak with him
16 because he was a grown man. In October appellant also attempted to friend a 15-
17 year-old girl.

18 Appellant was arrested and eventually charged with committing the above
19 assaults.

20 *Jury Selection*

21 Two issues relevant to this appeal arose during the jury selection process. First,
22 appellant's counsel noticed that the prosecutor had utilized six of their first seven
23 peremptory challenges on female prospective jurors. When the sixth prospective
24 female juror, K.G., was struck, appellant's counsel made a *Batson/Wheeler*⁶
25 objection. The trial court overruled this objection quickly, noting objective
26 reasons why the prospective juror could be excluded, including her age and lack
27 of sleep. The prosecutor agreed and further pointed to her unique hair color and
28 multiple piercings.

The prosecutor's next challenge was also to a female prospective juror, L.W.
Appellant's counsel objected, renewing its *Batson/Wheeler* objection based on the
fact seven of nine objections were to women. The court determined a prima facie
showing had been made and asked the prosecutor for an explanation. The
prosecutor recounted a prior conversation with the prospective juror where she
claimed her neighbor had called the police on her after peeking through her
windows and seeing her dog going to the bathroom on the rug. The prosecutor
also found it odd the prospective juror was more upset about this incident than the
death of her son and had apparently gone to law school for a year because she had
become interested in the law while serving as president of a teacher's association.
The prosecutor thought this prospective juror might have mental deficiencies.

Appellant's counsel requested explanations for all other female prospective jurors
dismissed as well, claiming the objection made was to all of them. The prosecutor
argued such an explanation was not required. The court noted its prima facie
finding related only to the most recent dismissal and found the prosecutor's
explanation as to that prospective juror sufficient to show she was not dismissed
for being a woman. It therefore did not require the prosecutor to provide any

⁶ A *Batson/Wheeler* motion takes its name from two cases, *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258, 276–277 (*Wheeler*).

1 further explanations. The court also noted at the time that four men and seven
2 women were in the jury box.

3 Jury selection continued, and 12 jurors were selected. The court swore in those
4 jurors, then took a break for the day before continuing on to select alternates.
5 During this break, one of the jurors learned his wife had been diagnosed with
6 cancer and would undergo surgery in two days. The next morning, the court
7 inquired into the juror's discovery and ultimately determined that the juror should
8 be excused for cause. During these proceedings, the parties debated on how to
9 proceed.

10 The prosecutor argued the court should wait to dismiss the juror until after the
11 alternates were sworn, then replace the juror with an alternate. The defense stated
12 it was willing to stipulate to reopening voir dire, but only if the court provided the
13 defense with its full 20 peremptory challenges, rather than the two it had not
14 previously exercised. An alternative, the defense argued, was granting a mistrial
15 and beginning jury selection again. The court, instead, dismissed the juror, denied
16 a defense motion for a mistrial, and proceeded to the selection of alternates. When
17 this was complete, the court placed one of those alternates on the jury and
18 proceeded to trial.

19 *Appellant's Trial and Conviction*

20 One of appellant's goals for trial was to challenge the TrueAllele DNA results. As
21 part of his attempt to do so, appellant made a pretrial request, and renewed that
22 request at trial, for the source code to the TrueAllele program. The People
23 opposed this request, arguing the code was subject to the trade secret privilege
24 contained in Evidence Code section 1060, and appellant had not made a proper
25 showing for production. They submitted a declaration from Dr. Perlin supporting
26 this claim.

27 The trial court held an in limine hearing on the request. Appellant's counsel
28 argued the source code was the only means to determine whether the programmed
mathematical formulas were working properly and noted there were discrepancies
between the results obtained when Dr. Perlin utilized the software and when
Sugimoto ran the same tests. Appellant's counsel further agreed to sign a
protective order to view the code. Counsel did not, though, submit a declaration
from their expert supporting a need for the requested evidence.

The trial court ultimately ruled there was "no declaration or showing, with any
precision or particularity, how a review of the TrueAllele source code would
enable the defense to determine what assumptions were made or how reviewing
the highly technical code would help defense counsel in cross-examining Dr.
Perlin" The court summarized its position by saying it did not "see a specific
logical connection between the source code to be examined and some
consequential fact" before recounting the various ways the TrueAllele software
has been validated previously, used in prior cases, and peer reviewed.

During trial, appellant raised his request again when objecting to testimony by Dr.
Perlin that the TrueAllele software objectively inferred genotypes. The trial court
again found no particularized showing warranting disclosure and denied the
request.

Appellant also sought to attack the TrueAllele results through expert testimony
and called Suzanna Ryan to testify regarding her review of the DNA analysis. The

People objected to portions of Ryan’s testimony concerning how TrueAllele works. They argued she lacked foundation to provide such testimony, given that she had neither used nor been trained on the software. The trial court agreed, explaining it would only allow Ryan to testify regarding “the methodology that she has employed in the past ... within the confines of what tests she’s actually run” and not how TrueAllele results could be different based on changed settings. The court sustained several prosecutorial objections to questions posed to Ryan on these or similar grounds.

Johnson, 2019 WL 3025299, at *1–8.

III.

STANDARD OF REVIEW

Relief by way of a petition for writ of habeas corpus extends to a person in custody pursuant to the judgment of a state court if the custody is in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); Williams v. Taylor, 529 U.S. 362, 375 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution. The challenged convictions arise out of the Kern County Superior Court, which is located within the Eastern District of California. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(d).

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which applies to all petitions for writ of habeas corpus filed after its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc). The instant petition was filed after the enactment of AEDPA and is therefore governed by its provisions.

Under AEDPA, relitigation of any claim adjudicated on the merits in state court is barred unless a petitioner can show that the state court’s adjudication of his claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); Davis v. Ayala, 576 U.S. 257, 268–69 (2015); Harrington v. Richter, 562 U.S. 86, 97–98 (2011); Williams, 529 U.S. at 413. Thus, if a petitioner’s claim has been

1 “adjudicated on the merits” in state court, “AEDPA’s highly deferential standards” apply. Ayala,
2 576 U.S. at 269. However, if the state court did not reach the merits of the claim, the claim is
3 reviewed *de novo*. Cone v. Bell, 556 U.S. 449, 472 (2009).

4 In ascertaining what is “clearly established Federal law,” this Court must look to the
5 “holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the
6 relevant state-court decision.” Williams, 529 U.S. at 412. In addition, the Supreme Court
7 decision must “‘squarely address[] the issue in th[e] case’ or establish a legal principle that
8 ‘clearly extend[s]’ to a new context to the extent required by the Supreme Court in . . . recent
9 decisions”; otherwise, there is no clearly established Federal law for purposes of review under
10 AEDPA and the Court must defer to the state court’s decision. Moses v. Payne, 555 F.3d 742,
11 754 (9th Cir. 2008) (alterations in original) (quoting Wright v. Van Patten, 552 U.S. 120, 125,
12 123 (2008)).

13 If the Court determines there is clearly established Federal law governing the issue, the
14 Court then must consider whether the state court’s decision was “contrary to, or involved an
15 unreasonable application of, [the] clearly established Federal law.” 28 U.S.C. § 2254(d)(1). A
16 state court decision is “contrary to” clearly established Supreme Court precedent if it “arrives at
17 a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state
18 court decides a case differently than [the Supreme Court] has on a set of materially
19 indistinguishable facts.” Williams, 529 U.S. at 413. A state court decision involves “an
20 unreasonable application of[] clearly established Federal law” if “there is no possibility
21 fairminded jurists could disagree that the state court’s decision conflicts with [the Supreme
22 Court’s] precedents.” Richter, 562 U.S. at 102. That is, a petitioner “must show that the state
23 court’s ruling on the claim being presented in federal court was so lacking in justification that
24 there was an error well understood and comprehended in existing law beyond any possibility for
25 fairminded disagreement.” Id. at 103.

26 If the Court determines that the state court decision was “contrary to, or involved an
27 unreasonable application of, clearly established Federal law,” and the error is not structural,
28 habeas relief is nonetheless unavailable unless it is established that the error “had substantial and

injuriously effect or influence” on the verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (internal quotation mark omitted) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

AEDPA requires considerable deference to the state courts. Generally, federal courts “look through” unexplained decisions and review “the last related state-court decision that does provide a relevant rationale,” employing a rebuttable presumption “that the unexplained decision adopted the same reasoning.” Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). This presumption may be rebutted “by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court’s decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed.” Id.

“When a federal claim has been presented to a state court[,], the state court has denied relief,” and there is no reasoned lower-court opinion to look through to, “it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” Richter, 562 U.S. at 99. Where the state court reaches a decision on the merits and there is no reasoned lower-court opinion, a federal court independently reviews the record to determine whether habeas corpus relief is available under § 2254(d). Walker v. Martel, 709 F.3d 925, 939 (9th Cir. 2013). “Independent review of the record is not *de novo* review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable.” Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). The federal court must review the state court record and “must determine what arguments or theories . . . could have supported, the state court’s decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme] Court.” Richter, 562 U.S. at 102.

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1 **IV.**

2 **DISCUSSION**

3 **A. Access to Source Code**

4 In his first claim for relief, Petitioner asserts that the trial court's denial of Petitioner's
 5 request to access the source code utilized to run the software that analyzed the DNA evidence
 6 violated his Sixth Amendment right to confrontation and compulsory process and his Fourteenth
 7 Amendment rights to present a defense and to a fair trial. (ECF No. 8 at 4, 11–22.)⁷ Respondent
 8 argues that rejecting Petitioner's DNA challenges was reasonable and that a novel claim must
 9 fail under AEDPA review. (ECF No. 16 at 8.) This claim was raised on direct appeal in the
 10 California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned
 11 decision. The claim was also raised in the petition for review, which the California Supreme
 12 Court summarily denied. (LD 82.) As federal courts "look through" summary denials and review
 13 "the last related state-court decision that does provide a relevant rationale," Wilson, 138 S. Ct. at
 14 1192, this Court will examine the decision of the California Court of Appeal.

15 In denying Petitioner's claim regarding access to the source code, the California Court of
 16 Appeal stated:

17 Both prior to and during trial, appellant moved for or requested discovery related
 18 to the DNA analyses using software developed by TrueAllele supporting the case
 19 against him. Specifically, appellant requested access to the source code utilized to
 20 run the software. The trial court rejected these requests on the ground the source
 21 code was a trade secret under Evidence Code section 1060, and that appellant had
 22 not made a prima facie showing the code was relevant or necessary to his defense.
 23 On appeal, appellant contends these rulings violated his Fifth, Sixth, and
 24 Fourteenth Amendment rights. The People respond through several arguments
 25 including that appellant was not entitled to pretrial production and that he failed to
 26 meet his burden for obtaining the evidence at trial. The People further contend
 27 appellant had no Sixth Amendment pretrial right to obtain the evidence, and that
 28 the routine application of evidentiary laws does not implicate appellant's
 constitutional rights. Finally, the People argue any error was harmless.

24 ***Standard of Review and Applicable Law***

25 "Evidence Code section 1060 provides that an owner of a trade secret has a
 26 privilege to refuse to disclose the secret. Evidence Code section 1061, subdivision
 27 (b)(1) requires that a party in a criminal action seeking a protective order submit
 28 an affidavit based on personal knowledge listing the affiant's qualifications to

⁷ Page numbers refer to the ECF page numbers stamped at the top of the page.

1 give an opinion, identifying the alleged trade secret, identifying the documents
 2 disclosing the trade secret, and presenting evidence that the secret qualifies as a
 3 trade secret.” (*Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1144–1145,
 4 italics omitted.) The statutory scheme has been interpreted such that “the party
 5 claiming the privilege has the burden of establishing its existence. [Citations.]
 6 Thereafter, the party seeking discovery must make a prima facie, particularized
 7 showing that the information sought is relevant and necessary to the proof of, or
 8 defense against, a material element of one or more causes of action presented in
 9 the case, and that it is reasonable to conclude that the information sought is
 10 essential to a fair resolution of the lawsuit. It is then up to the holder of the
 11 privilege to demonstrate any claimed disadvantages of a protective order. Either
 12 party may propose or oppose less intrusive alternatives to disclosure of the trade
 13 secret, but the burden is upon the trade secret claimant to demonstrate that an
 14 alternative to disclosure will not be unduly burdensome to the opposing side and
 15 that it will maintain the same fair balance in the litigation that would have been
 16 achieved by disclosure.” (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7
 17 Cal.App.4th 1384, 1393.)

18 “The court’s ruling on a discovery motion is subject to review for abuse of
 19 discretion.” (*People v. Jenkins* (2000) 22 Cal.4th 900, 953.) “A trial court has
 20 abused its discretion in determining the applicability of a privilege when it utilizes
 21 the wrong legal standards to resolve the particular issue presented.” (*Seahaus La
 22 Jolla Owners Assn. v. Superior Court* (2014) 224 Cal.App.4th 754, 766.)

23 Errors of both statutory and constitutional magnitude are generally subject to a
 24 harmless error analysis. Constitutional errors are generally subject to the federal
 25 harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24,
 26 asking “ ‘whether it is clear beyond a reasonable doubt that a rational jury
 27 would have reached the same verdict absent the error.’ ” (*People v. Capistrano*
 28 (2014) 59 Cal.4th 830, 873, overruled on other grounds by *People v. Hardy*
 (2018) 5 Cal.5th 56, 104.) Where the right to effective cross-examination is at
 issue the analysis is “based on factors such as: ‘the importance of the witness’
 testimony in the prosecution’s case, whether the testimony was cumulative, the
 presence or absence of evidence corroborating or contradicting the testimony of
 the witness on material points, the extent of cross-examination otherwise
 permitted, and, of course, the overall strength of the prosecution’s case.’ ” (*People
 v. Sully* (1991) 53 Cal.3d 1195, 1220.) Statutory errors, including the denial of a
 defendant’s motion to compel discovery, are generally subject to the state
 harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836, asking
 whether “it is reasonably probable that the error affected the trial result.” (*People
 v. Elder* (2017) 11 Cal.App.5th 123, 133.)

29 ***Any Error was Harmless Beyond a Reasonable Doubt***

30 The briefs in this case argue the issues surrounding the trial court’s decision not to
 31 grant appellant access to the TrueAllele source code from contrasting positions.
 32 Appellant and the amicus briefs focus heavily on the constitutional protections
 33 they contend require production of source code for machine derived testimony
 34 that utilizes human-programmed mathematical operations that cannot be
 35 independently verified exclusive of the programming. They rightly express
 36 serious concern that convictions utilizing such results without production of the
 37 source code could result in convictions based on “black box” judgments and point
 38 out that appellant made a particularized showing that running the same evidence
 through the software two times, in two different locations, yielded different
 results, some of which were helpful to the defense. They argue this was a

1 satisfactory showing to warrant production given the high probability the source
2 code contained errors. The People argue that this case turns on the mere
3 application of evidentiary law and that such routine rulings do not even implicate
4 constitutional protections. Further, the People argue the record supports the trial
court's finding that the predicate showings for the production of trade secret
protected evidence were not met. The People conclude by arguing any error was
harmless.

5 We recognize that appellant made a strong showing that the software produced
6 arguably inconsistent results and acknowledge that in such situations the software
7 is the most likely source of clarification for such issues. However, we do not
8 reach whether the trial court erred in rejecting either of appellant's requests for
production because we readily conclude the evidence overwhelmingly confirms
appellant's guilt and, thus, any error was harmless, even under the elevated
federal analysis.

9 In this case, the prosecution built a strong circumstantial case that the four
10 incidents involving break-ins, robberies, assault, or rapes were committed by the
11 same individual. The attacker was consistently described as a black male with a
12 deep voice and hazel eyes. In three of the four incidents, the attacker was
described as smelling dirty or of cigarettes. The attacker consistently wore a black
hooded sweatshirt and ski mask. In several incidents, the attacker carried a black
backpack.

13 A similar modus operandi, including increasing efforts to avoid detection, was
14 also shown across the attacks. Each occurred in the early morning hours and
15 appeared to be committed by someone that preferred to enter through windows. In
16 the first, second, and fourth incidents, the women awoke to a man in their room
17 and, in two instances, awoke to him covering their mouths. In the first and fourth
18 incidents, the attacker possessed a gun. In the second and fourth incidents, the
19 attacker obtained a knife and used that knife to remove the victims' clothing or
20 bindings. In all four incidents, the attacker covered the victims' head or eyes. The
attacker used available items in the home, or duct tape and zip ties brought for the
attack, to bind the victims. The attacker engaged in touching and fondling
activities before sexual activity and utilized a condom or towels to reduce or
eliminate evidence. The attacker regularly cleaned the victims after engaging in
sexual contact and collected the items used to bind the victims when leaving. The
attacker spoke with several of the victims in conversational ways about his sexual
desire, need for money, or actions. In all four incidents, the attacker took or hid
the victims' cellular phone after the attack.

21 The prosecution further built a strong circumstantial case, exclusive of DNA
22 evidence, that appellant was the attacker in one or more of the incidents. In the
23 first incident, a shoe print could not be ruled out as coming from a shoe belonging
24 to appellant and his cellular phone records suggested he was near the attack when
25 it occurred. In the second incident, appellant was described as wearing black
26 shoes and the tread from black Reebok shoes found at appellant's residence
27 appeared to match tread marks found at the crime scene. Moreover, appellant's
28 cell phone accessed the cellular tower covering the area of the crime scene only
once in the four months of phone records reviewed, a time roughly one hour after
the attack. For the third incident, appellant's cell phone was in the area of the
attack, although the tower also covered appellant's home. In the fourth incident,
the attacker was described as wearing red shoes and the tread from red Nike shoes
recovered at appellant's residence appeared similar to tread marks found at the
crime scene. In that incident, \$5,000 in cash was stolen. Shortly after the theft,

1 appellant's girlfriend bought a \$2,250 car with cash and appellant posted a
 2 response to a social media comment about his status as a criminal that said, "yeah,
 3 but when da money come in, what you be saying? Can you buy me a new car?
 4 Yeah."

5 While the case made by the People was circumstantial, it was not, as appellant
 6 argues, so weak that "it is doubtful that the prosecution had legally sufficient
 7 evidence to support its case against appellant" without the TrueAllele evidence.
 8 The prosecution presented a confluence of circumstances, each unique if not
 9 particularly strong but compelling in combination, showing both that the crimes
 10 were committed by one person and that appellant committed one or more of the
 11 crimes. Thus, where there were three different shoe prints at three different crime
 12 scenes, and witnesses had described the shoes in two of those incidents, appellant
 13 was found to have multiple pairs of shoes that both matched the description
 14 provided by the witnesses and/or could not be ruled out as causing the print for
 15 each incident. Similarly, in three of the four incidents, appellant was using his
 16 phone before and after, but not during the attack, in locations that utilized cell
 17 towers covering the crime scenes and, in one situation, this was the only time
 18 appellant's phone was in that area over a several month period. Added to these
 19 circumstances were appellant's access to cash immediately after one of the
 20 robberies, his statements to police suggesting guilt, his search history for
 21 information on the attacks, his admissions to other robberies, his possession of
 22 clothing and tools such as the zip ties similar to those used in the attacks, and his
 23 cell phone videos demonstrating sexually driven prowling behaviors. Simply put,
 24 if this case had been tried prior to the advent of DNA evidence, or without the
 25 DNA component, we see little if any basis for an appeal on the state of the
 26 evidence. The circumstantial evidence of guilt was simply overwhelming.⁸

27 Appellant was also permitted to challenge the DNA evidence against him in
 28 several ways, including through his own expert and cross-examination of the
 prosecution's experts. He was able to highlight the fact that many of the DNA
 samples tested excluded him as a donor and that there were inconsistent
 conclusions between the two uses of the TrueAllele software. To the extent his
 right to cross-examination was limited, it was not heavily limited with respect to
 the DNA evidence and not limited at all with respect to the most important
 witnesses in the case, the victims and the police criminologists gathering non-
 DNA evidence. Accordingly, we conclude any error in failing to require
 production of the TrueAllele source code was harmless beyond a reasonable
 doubt.

21 Johnson, 2019 WL 3025299, at *8–11.

22 "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in
 23 the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution
 24 guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'"

25 Crane v. Kentucky, 476 U.S. 683, 690 (1986) (citations omitted) (quoting California v.

26 ⁸ We note, too, that the manual interpretation of DNA found on the roadway zip tie was sufficient to provide a
 27 CODIS hit with appellant's known sample and clear enough that appellant's own DNA expert admitted appellant's
 28 DNA was on the item. These DNA findings are not related to the disputes raised with respect to the TrueAllele
 program's probabilistic analysis of multi-source low-level DNA and further buttresses the prosecution's otherwise
 convincing circumstantial case.

1 Trombetta, 467 U.S. 479, 485 (1984)). Violations of both the right to present a complete defense
 2 and the Confrontation Clause are subject to harmless error review. Crane, 476 U.S. at 691;
 3 Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Under Chapman v. California, 386 U.S. 18
 4 (1967), “the test for determining whether a constitutional error is harmless . . . is whether it
 5 appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict
 6 obtained.’” Neder v. United States, 527 U.S. 1, 15 (1999) (quoting Chapman, 386 U.S. at 24).
 7 “When a state court has applied Chapman, § 2254(d)(1) requires a habeas petitioner to prove that
 8 the state court’s decision was unreasonable. To accomplish that, a petitioner must persuade a
 9 federal court that no ‘fairminded juris[t]’ could reach the state court’s conclusion under [the
 10 Supreme] Court’s precedents.” Brown v. Davenport, 142 S. Ct. 1510, 1525 (2022) (first
 11 alteration in original) (citations omitted). That is, “AEDPA asks whether *every* fairminded jurist
 12 would agree that an error was prejudicial[.]” Davenport, 142 S. Ct. at 1525.

13 Whether a Confrontation Clause error “is harmless in a particular case depends upon a
 14 host of factors,” including “[1] the importance of the witness’ testimony in the prosecution’s
 15 case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence
 16 corroborating or contradicting the testimony of the witness on material points, [4] the extent of
 17 cross-examination otherwise permitted, and, of course, [5] the overall strength of the
 18 prosecution’s case.” Van Arsdall, 475 U.S. at 684. Here, the California Court of Appeal found
 19 any error to be harmless because the evidence at trial, excluding the challenged DNA evidence,
 20 “built a strong circumstantial case” and the court “readily conclude[d] the evidence
 21 overwhelmingly confirms [Petitioner]’s guilt.” Johnson, 2019 WL 3025299, at *10. “[T]he state
 22 court did not, and need not, analyze the five Van Arsdall factors.” Gonzales v. Stainer, 507 F.
 23 App’x 704, 705–06 (9th Cir. 2013) (citing Early v. Packer, 537 U.S. 3, 8 (2002)).

24 With respect to the first factor, importance of the challenged DNA evidence in the
 25 prosecution’s case, the Court looks to the prosecution’s closing argument. See Gautt v. Lewis,
 26 489 F.3d 993, 1013 (9th Cir. 2007) (“The purpose behind a closing argument is ‘to explain to the
 27 jury what it has to decide and what evidence is relevant to its decision.’ The government’s
 28 closing argument is that moment in the trial when a prosecutor is compelled to reveal her own

1 understanding of the case as part of her effort to guide the jury’s comprehension.” (quoting
2 Sandoval v. Calderon, 241 F.3d 765, 776 (9th Cir. 2000))). The prosecutor’s closing argument
3 began with playback of the victims’ voices. (33 RT⁹ 5751–52.) Immediately thereafter, the
4 prosecutor stated:

5 [She] acted with incredible courage. . . . Her 911 call on that pink
6 Disney princess telephone caused the defendant to run away, back
7 out into the night, but in his haste he dropped something, and it
8 was his undoing. He dropped two 11-inch zip ties, hooked together
9 once, and this was to be his undoing, because this had his DNA on
10 it, and enough of it for an upload into CODIS, and the forensic
11 evidence has exposed him.

12 A basic principle involved in forensic science is the perpetrator of
13 a crime will bring something into a crime scene and leave it there.
14 That held true in this case. Wherever he steps, whatever he
15 touches, whatever he leaves, even unconsciously, will serve as a
16 silent witness against him. This is evidence that does not forget. It
17 is not confused by the excitement of the moment. It is not absent,
18 because human witnesses are. It is factual evidence.

19 Physical evidence cannot perjure itself. Only human failure to find
20 it, study it, and understand it can diminish its value. This is a quote
21 from a forensic scientist from 62 years ago.

22 And the world of nine women and children from east Bakersfield,
23 California, came together with the world of forensic scientists here
24 in Bakersfield and in Pittsburgh, Pennsylvania, and these DNA
25 experts have enabled the light of truth to shine on the defendant.
26 The evidence in this case has shown that Billy Ray Johnson is the
27 person who committed these acts of sexual depravity upon all of
28 these victims and it is now time to see that justice is served.

(33 RT 5752–53.) The prosecutor’s first mention of evidence during closing argument referred to
DNA. The prosecutor also distinguished and elevated the DNA evidence from other evidence
because it “does not forget,” “is not confused by the excitement of the moment,” “is not absent,”
and “cannot perjure itself.” (33 RT 5752.) This supports a conclusion that the challenged DNA
evidence was important to the prosecution’s case. Accordingly, the first factor weighs against a
finding of harmless error.

With respect to the second factor, the challenged DNA evidence was not cumulative of
other evidence, and thus, weighs against a finding of harmless error. With respect to the third

⁹ “RT” refers to the Reporter’s Transcript of Testimony and Proceedings lodged by Respondent on October 21, 2021. (ECF No. 14.)

1 factor, the presence of absence of evidence corroborating or contradicting the testimony of the
2 witness on material points, the manual analysis of the various DNA samples generally did not
3 result in a match to Petitioner. See Johnson, 2019 WL 3025299, at *3–6. However, utilizing both
4 manual interpretation and the TrueAllele software, all the experts agreed that Petitioner’s DNA
5 was on the roadway zip tie. See Johnson, 2019 WL 3025299, at *5–6. Accordingly, the third
6 factor is neutral or weighs slightly against a finding of harmless error. With respect to the fourth
7 factor, the extent of cross-examination permitted, although the defense was not given access to
8 the TrueAllele program source code, defense counsel was able to extensively cross-examine the
9 prosecution’s expert witnesses. Thus, the fourth factor weighs in favor of a finding of harmless
10 error.

11 With respect to the fifth factor, the overall strength of the prosecution’s case, as set forth
12 above, the California Court of Appeal listed a panoply of evidence that supported Petitioner’s
13 convictions without the challenged DNA evidence, including: Petitioner having multiple pairs of
14 shoes that both matched the description provided by witnesses and/or could not be ruled out as
15 causing the three different shoe prints at three different crime scenes; in three of the four
16 incidents, Petitioner was using his phone before and after, but not during the attack, in locations
17 that utilized cell towers covering the crime scenes; in the remaining incident, Petitioner was
18 using his phone in a location that utilized a cell tower covering the crime scene and it was the
19 only time Petitioner’s phone was in that area over a several month period; Petitioner having
20 access to cash immediately after one of the robberies; Petitioner’s statements to law enforcement
21 suggesting guilt and his admissions to other robberies; Petitioner’s search history for information
22 on the incidents and his cell phone videos demonstrating sexually driven prowling behaviors;
23 and Petitioner’s possession of clothing and tools (*e.g.*, zip ties) similar to those used in the
24 incidents. Accordingly, the fifth factor weighs in favor of a finding of harmless error.

25 “The term ‘unreasonable’ [in § 2254(d)] refers not to ‘ordinary error’ or even to
26 circumstances where the petitioner offers ‘a strong case for relief,’ but rather to ‘extreme
27 malfunctions in the state criminal justice syste[m].’” Mays v. Hines, 141 S. Ct. 1145, 1149
28 (2021) (per curiam) (some internal quotation marks omitted) (second alteration in original)

(quoting Richter, 562 U.S. at 102). Petitioner has not established that no fairminded jurist could reach the state court's conclusion under Supreme Court precedent. See Davenport, 142 S. Ct. at 1525. Therefore, the Court finds that the state court's harmless error determination regarding the trial court's denial of Petitioner's request to access the TrueAllele source code was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief on his first claim, and it should be denied.

B. Exclusion of Expert Testimony

In his second claim for relief, Petitioner asserts that the trial court's exclusion of Petitioner's expert testimony regarding the assumptions made about the sample material input into the TrueAllele program violated his rights to confrontation, compulsory process, and due process. (ECF No. 8 at 4, 23–27.) Respondent argues that rejecting Petitioner's DNA challenges was reasonable. (ECF No. 16 at 8.) This claim was raised on direct appeal in the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The claim was also raised in the petition for review, which the California Supreme Court summarily denied. (LD 82.) As federal courts "look through" summary denials and review "the last related state-court decision that does provide a relevant rationale," Wilson, 138 S. Ct. at 1192, this Court will examine the decision of the California Court of Appeal, Fifth Appellate District.

In denying Petitioner's exclusion of expert testimony claim, the California Court of Appeal stated:

In a partially-related argument, appellant objects to the trial court's exclusion of certain expert evidence he proffered regarding the way certain assumptions entered into the TrueAllele software affect the results generated. Specifically, appellant contends the trial court incorrectly concluded that appellant's expert, Suzanna Ryan, was not qualified to testify about how assumptions made when setting up the TrueAllele software affected the mathematical formula and, subsequently, the results of the tests because Ryan had not been formally trained on the software, or previously used it. Appellant contends these facts go to the weight, and not the admissibility of Ryan's testimony, that she was otherwise qualified, and that excluding her testimony was an abuse of discretion. He further

1 contends that the DNA evidence was essential to this case and, thus, the error
2 requires reversal.

3 ***Standard of Review and Applicable Law***

4 “The trial court has broad discretion in deciding whether to admit or exclude
5 expert testimony [citation], and its decision as to whether expert testimony meets
6 the standard for admissibility is subject to review for abuse of discretion.” (*People*
7 *v. McDowell* (2012) 54 Cal.4th 395, 426.) Generally, any error excluding portions
8 of a defense is one of state law where we apply the *Watson* standard and ask
whether it was reasonably probable that a defendant would have obtained a more
favorable result, although certain constitutional errors—such as the complete
exclusion of a defense—may be reviewed under the *Chapman* standard, asking
whether any error was harmless beyond a reasonable doubt. (See *People v. Jones*
(2012) 54 Cal.4th 1, 68.)

9 ***Any Error Was Harmless***

10 Appellant’s arguments focus on the trial court’s decision to exclude a portion of
11 his defense, in the form of testimony regarding the effect of certain choices upon
12 the results generated by the TrueAllele software. While appellant claims that this
13 exclusion prevented him from presenting any defense about the reliability of the
14 DNA results generated by the TrueAllele software program, we need not resolve
15 whether his assertions reach the level of constitutional error warranting *Chapman*
16 review. This is so because any alleged error is harmless beyond a reasonable
17 doubt. As discussed in the previous section, the People presented a strong case
18 derived from numerous pieces of circumstantial evidence that did not require the
19 use of DNA evidence, where the evidence of guilt was simply overwhelming.
20 Although the People worked to buttress their case with DNA results, those results
21 were not as strong as the circumstantial evidence and not necessary for
conviction. Indeed, the results of tests from the two labs involved conflicted in
several instances, one lab found evidence inconclusive or exclusionary while the
other found it inculpatory. These differences were admitted at trial and used as a
part of the defense. In this context, the court’s decision to limit appellant’s expert
testimony based on the expert’s failure to have previously used or been trained on
the TrueAllele program was not significant to the case. Appellant had already
placed the DNA results in question and, more importantly, the overwhelming
circumstantial evidence presented regarding his participation in these attacks
rendered exclusion of any additional attacks on that DNA evidence harmless
beyond a reasonable doubt.

22 Johnson, 2019 WL 3025299, at *11.

23 Although inclusion of the defense expert’s testimony regarding the effect of certain
24 choices upon the results generated by the TrueAllele software would have allowed the defense to
25 further attack the credibility and reliability of the DNA results generated by the software, defense
26 counsel extensively cross-examined Perlin and Sugimoto and repeatedly emphasized to the jury
27 the differing and sometimes conflicting results obtained from the two experts using the same
28 software. Furthermore, as set forth in section IV(B), *supra*, there was a panoply of other

evidence that supported Petitioner's convictions such that Petitioner has not established that no fairminded jurist could reach the state court's harmless error conclusion.

Based on the foregoing, the Court finds that the state court's harmless error determination regarding the trial court's exclusion of the defense expert's testimony regarding the effect of certain choices upon the results generated by the TrueAllele software was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief on his second claim, and it should be denied.

C. Discharge of Juror

In his third claim for relief, Petitioner asserts that the trial court's failure to grant a mistrial after discharge of a juror violated his statutory and Fifth and Sixth Amendment rights. (ECF No. 8 at 5, 27–28.) Respondent argues that rejecting a mistrial claim was reasonable. (ECF No. 16 at 12–13.) This claim was raised on direct appeal in the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The claim was also raised in the petition for review, which the California Supreme Court summarily denied. (LD 82.) As federal courts "look through" summary denials and review "the last related state-court decision that does provide a relevant rationale," Wilson, 138 S. Ct. at 1192, this Court will examine the decision of the California Court of Appeal, Fifth Appellate District.

In denying Petitioner's mistrial claim, the California Court of Appeal stated:

Appellant first contends the court incorrectly failed to order a mistrial when it dismissed one of the original 12 sworn jurors before alternates were selected. We find any error harmless.

Standard of Review and Applicable Law

Code of Civil Procedure section 233 governs the discharge of jurors unable to perform their duties and applies to the situation in this case. It provides detailed instructions when a jury is dismissed, as follows:

"If, before the jury has returned its verdict to the court, a juror ..., upon other good cause shown to the court, is found to be unable to perform his or her duty, the court may order the juror to be discharged. If any alternate

jurors have been selected as provided by law, one of them shall then be designated by the court to take the place of the juror so discharged. If after all alternate jurors have been made regular jurors or if there is no alternate juror, a juror becomes ... unable to perform the juror's duty and has been discharged by the court as provided in this section, the jury shall be discharged and a new jury then or afterwards impaneled, and the cause may again be tried. Alternatively, with the consent of all parties, the trial may proceed with only the remaining jurors, or another juror may be sworn and the trial begin anew."

The parties dispute how we should review any error arising under this law.

Harmless Error Analysis Applies and Any Error Was Harmless

Appellant argues that the specific language of Code of Civil Procedure section 233 demonstrates that the court erroneously failed to grant a mistrial upon removing one of the 12 sworn jurors prior to selecting alternates to replace him. Appellant claims such an error is structural in nature and, therefore, reversible per se. The People concede that, under "the plain language of Code of Civil Procedure section 233, the trial court should have discharged the jury after it dismissed the sworn juror, because there was no alternate juror and the defense did not consent to proceed with 11 jurors for the remainder of jury selection," but argue we should interpret the statute to avoid such an absurdity and that any error was harmless.

We take no position on whether the statute's plain language requires restarting jury selection if a sworn juror is dismissed in the period between swearing in the original 12 jurors and selecting and swearing in the alternates. We do not agree, however, that any error in this instance is structural and reversible per se. Rather, if any error occurred, it was a violation of state law jury selection statutes.

As the People note, appellant's right to proceed with a particular jury attaches once the jury is sworn and double jeopardy attaches. (See *People v. Whitaker* (2013) 213 Cal.App.4th 999, 1011.) However, double jeopardy does not attach until after the alternate jurors are selected and sworn in. (See *People v. Griffin* (2004) 33 Cal.4th 536, 565–566, disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) The trial court's decision to select alternate jurors after dismissing one of the sworn jurors thus did not impair appellant's fundamental right to a jury trial or otherwise permit him to be convicted by a jury of less than 12 of his peers. Accordingly, any error is subject to state law harmless error analysis. (See *People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Rambaud* (1926) 78 Cal.App. 685, 692 ["The order of selecting a juror is a matter of procedure and ... the state constitution specifies that no error as to any matter of procedure shall be held sufficient to set aside a verdict or order a new trial, unless it appears from the record that the error complained of has caused a miscarriage of justice."].)

Under this standard, we conclude the error was harmless. Procedurally, appellant was aware that alternate jurors would be selected for his trial. And appellant eventually selected alternate jurors knowing that one of them would be placed on his jury panel due to the dismissal. While appellant raises a concern that his ability to select a jury based on his understanding of how all 12 jurors will interact was impaired, we do not see this as prejudicial error under the circumstances. Indeed, appellant was required to select alternate jurors even if no prior juror had been dismissed and, if the dismissal issue had not arisen until after swearing in the

alternates, appellant would have been in at least the same, if not a worse, position given that one of the alternates would have been properly placed on the jury upon dismissal of the original juror and appellant would not have been able to screen the alternates based on the knowledge one would definitively be included in the deliberations. Ultimately, appellant proceeded to trial with 12 jurors and the remaining alternates, and with knowledge that any selected alternate could be added to the original jury panel. Other than the knowledge that one alternate would definitively be added to the jury, this process was no different than intended under the law. We further see the error as harmless substantively. For all the reasons previously discussed, we see no possibility that this change in the jury's makeup affected the outcome of this case. Accordingly, any error was harmless.

Johnson, 2019 WL 3025299, at *11–13.

“The Sixth Amendment guarantees a criminal defendant the right to a ‘fair trial by a panel of impartial, indifferent jurors.’” Bell v. Uribe, 748 F.3d 857, 868–69 (9th Cir. 2014) (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)). “[A] defendant is only entitled to a jury composed of ‘jurors who will conscientiously apply the law and find the facts,’ and that is ‘capable and willing to decide the case solely on the evidence before it.’” Bell, 748 F.3d at 869 (first quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984); then quoting Lockhart v. McCree, 476 U.S. 162, 178 (1986)). Although the trial court may have failed to comply with California jury selection statutes when it dismissed one of the original twelve sworn jurors before alternates were selected, Petitioner does not establish that any member of the final jury panel was not impartial or unable to conscientiously apply the law and find the facts solely based on the evidence before them. If any error occurred, it was an issue of state law, and “federal habeas corpus relief does not lie for errors of state law.” Swarthout v. Cooke, 562 U.S. 216, 219 (2011) (per curiam).

Based on the foregoing, the Court finds that the state court’s denial of the mistrial claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of fact. The decision was not “so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement.” Richter, 562 U.S. at 103. Accordingly, Petitioner is not entitled to habeas relief on his third claim, and it should be denied.

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D. Batson/Wheeler

In his fourth claim for relief, Petitioner asserts that the trial court erred in denying his Batson/Wheeler motion. (ECF No. 8 at 5, 29–32.) Respondent argues that the state court’s rejection of this claim was reasonable. (ECF No. 16 at 13–15.) This claim was raised on direct appeal to the California Court of Appeal, Fifth Appellate District, which denied the claim in a reasoned decision. The claim also was raised in Petitioner’s petition for review in the California Supreme Court, which summarily denied the petition. As federal courts review the last reasoned state court opinion, the Court will “look through” the summary denial and examine the decision of the California Court of Appeal. See Wilson, 138 S. Ct. at 1192.

In denying the Batson/Wheeler claim, the California Court of Appeal stated:

Appellant’s second procedurally-based concern arises from how the trial court managed his *Batson/Wheeler* objections during the jury selection process.

Standard of Review and Applicable Law

The use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates both the California and United States Constitutions. (*Batson*, *supra*, 476 U.S. at p. 89 [right to equal protection]; see *Wheeler*, *supra*, 22 Cal.3d at pp. 276–277 [right to trial by jury drawn from representative cross-section of the community]; see also *People v. Burgener* (2003) 29 Cal.4th 833, 863.) “A party who suspects improper use of peremptory challenges must raise a timely objection and make a prima facie showing that one or more jurors [have] been excluded on the basis of group or racial identity.” (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 993.) “Once a prima facie showing has been made, the prosecutor then must carry the burden of showing that he or she had genuine nondiscriminatory reasons for the challenges at issue.” (*Ibid.*) At that point, the trial court must decide whether the opponent of the challenge has proved purposeful discrimination. (*People v. McDermott* (2002) 28 Cal.4th 946, 971.)

This next part of the *Batson/Wheeler* analysis “focuses on the subjective genuineness of the reason, not the objective reasonableness.” (*People v. Gutierrez* (2017) 2 Cal.5th 1150, 1158 (*Gutierrez*)). It is, in essence, a credibility determination in which “the court may consider, ‘ “among other factors, the prosecutor’s demeanor; ... how reasonable, or how improbable, the explanations are; and ... whether the proffered rationale has some basis in accepted trial strategy.” ’ ” (*Ibid.*) “To satisfy herself that an explanation is genuine, the presiding judge must make ‘a sincere and reasoned attempt’ to evaluate the prosecutor’s justification, with consideration of the circumstances of the case known at that time, her knowledge of trial techniques, and her observations of the prosecutor’s examination of panelists and exercise of for-cause and peremptory challenges.” (*Id.* at p. 1159.)

In carrying out this obligation, the trial court is not required to make specific or detailed comments for the record to justify every instance where it finds a prosecutor’s nondiscriminatory reason for exercising a peremptory challenge as

genuine. This is particularly true where the prosecutor bases his or her nondiscriminatory reason for exercising a peremptory challenge on the prospective juror's demeanor, or similar intangible factors, while in the courtroom. (*People v. Reynoso* (2003) 31 Cal.4th 903, 919.) In contrast, “ ‘when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, more is required of the trial court than a global finding that the reasons appear sufficient.’ ” (*Gutierrez, supra*, 2 Cal.5th at p. 1171.) Ultimately, while the “movant must show it was ‘ ‘more likely than not that the challenge was improperly motivated’ ” (*id.* at p. 1158), “the ultimate responsibility of safeguarding the integrity of jury selection and our justice system rests with courts” (*id.* at p. 1175).

We generally review the trial court's ruling on this issue for substantial evidence and with great restraint. (*People v. McDermott, supra*, 28 Cal.4th at p. 971.) “We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.” (*People v. Burgener, supra*, 29 Cal.4th at p. 864.) However, when assessing “the viability of neutral reasons advanced to justify a peremptory challenge by a prosecutor, both a trial court and reviewing court must examine only those reasons actually expressed.” (*Gutierrez, supra*, 2 Cal.5th at p. 1167.) “What courts should not do is substitute their own reasoning for the rationale given by the prosecutor, even if they can imagine a valid reason that would not be shown to be pretextual.” (*Id.* at p. 1159.)

“Excluding by peremptory challenge even ‘a single juror on the basis of race or ethnicity is an error of constitutional magnitude’ ” that “requires reversal of [appellant's] resulting convictions.” (*Gutierrez, supra*, 2 Cal.5th at p. 1172.)

The Court Did Not Err By Failing to Obtain Explanations for All Prior Strikes

Appellant raises a narrow issue with respect to how the trial court handled his *Batson/Wheeler* motions. Specifically, appellant contends the trial court should have made the prosecutor provide a gender-neutral explanation for each woman dismissed from the venire. Appellant argues this was required because his objection covered all women dismissed and the trial court found a *prima facie* case with respect to L.W.

Appellant's argument rests on his interpretation of *People v. Avila* (2006) 38 Cal.4th 491. In *Avila*, our Supreme Court held that a *Batson/Wheeler* motion made to a specific prospective juror does not trigger an obligation on the trial court to review all similar previously struck prospective jurors, even if a *prima facie* case is made as to the current objection that utilizes past strikes for support. (*Avila*, 38 Cal.4th at p. 552.) The court further noted that although the trial court had no specific duty to review prior strikes, “upon request it may appropriately do so when the prosecutor's subsequent challenge to a juror of a protected class casts the prosecutor's earlier challenges of the jurors of that same protected class in a new light, such that it gives rise to a *prima facie* showing of group bias as to those earlier jurors.” (*Ibid.*) Appellant contends his renewed objection as to all previous women struck triggered an obligation for the trial court to conduct a holistic review. The People oppose this contention, arguing appellant's renewed objection did not place the People's prior actions in a new light and, thus, the trial court was correct not to go any further than the current objection to L.W.

We agree with the People in this instance. *Avila* does not mandate that the trial court review all prior strikes upon a probable cause finding with respect to one prospective juror, even if an objection is made as to all strikes after probable cause is found as to one. Rather, *Avila* leaves such an inquiry within the trial court's discretion for those times it deems appropriate because the later objection places all prior objections in a new light.

In this instance, the court found a prima facie case based on the number of challenges made to women and its "recollection of the earlier and current responses by [L.W]." The People then explained its gender-neutral reasons for excluding L.W., including concerns about her mental state supported by answers and behaviors observed in court, and explained that the high number of objections to women was, in part, because there were many more women in the venire than men. The court concluded the People's arguments were sufficient and denied the motion with respect to L.W. At that point, it had heard a previous gender-neutral explanation for K.G., a gender-neutral explanation for L.W., and a viable explanation for why more women had been subject to objections. It also had a panel where several women were still serving such that, at the conclusion of the selection process, there were seven women on the jury.

Based on these facts, we see no error in the trial court's decision not to review all prior strikes to women. Resolution of the latest objection uncovered no gender-based concerns, and the panel was not being deprived of women based on the objections made. The court could properly conclude the prima facie case found with respect to L.W. was not sufficient to place all prior objections in a new light.

Johnson, 2019 WL 3025299, at *13–15.

Constitutional review of allegedly discriminatory peremptory challenges to prospective jurors in federal and state trials is governed by the standard established by the United States Supreme Court in Batson v. Kentucky, 476 U.S. 79, 89 (1986). In Batson, the Supreme Court set forth a three-step process for trial courts to follow to determine whether a peremptory challenge has been exercised on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment. Ayala, 576 U.S. at 270 (citing Snyder v. Louisiana, 552 U.S. 472, 476–77 (2008)). Batson also applies to gender discrimination. See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129 (1994); Flowers v. Mississippi, 139 S. Ct. 2228, 2243 (2019).

First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of [gender]. 476 U.S., at 96–97, 106 S.Ct. 1712. Second, if the showing is made, the burden shifts to the prosecutor to present a [gender]-neutral explanation for striking the juror in question. *Id.*, at 97–98, 106 S.Ct. 1712. Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even plausible"; so long as the reason is not inherently discriminatory, it suffices. Purkett v. Elem, 514 U.S. 765, 767–768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (*per*

1 *curiam*). Third, the court must then determine whether the
 2 defendant has carried his burden of proving purposeful
 3 discrimination. *Batson*, *supra*, at 98, 106 S.Ct. 1712. This final
 4 step involves evaluating “the persuasiveness of the justification”
 5 proffered by the prosecutor, but “the ultimate burden of persuasion

6 regarding racial motivation rests with, and never shifts from, the
 7 opponent of the strike.” *Purkett*, *supra*, at 768, 115 S.Ct. 1769.

8 Rice v. Collins, 546 U.S. 333, 338 (2006) (third alteration in original).

9 Here, Petitioner asserts that the “trial court committed reversible error by failing to
 10 require that the prosecution provide an explanation for the challenges of prospective jurors K.W.,
 11 K.C., K.B., and G.F. and J.W.,” arguing that the trial court “fail[ed] to follow the second step of
 12 the Batson process.” (ECF No. 8 at 31–32.) Respondent argues that there is at least a reasonable
 13 argument that no prior Supreme Court case has held that upon finding a *prima facie* case for later
 14 striking a woman, reasons are needed for prior striking of women; and regardless, the state
 15 appellate court held the trial court only found a *prima facie* case with respect to one prospective
 16 juror, “which leaves nothing to discuss.” (ECF No. 16 at 14–15.)

17 As set forth in section II, *supra*, defense counsel’s first Batson objection was made when
 18 the prosecution struck a sixth prospective female juror, K.G. The trial court overruled this
 19 objection, finding no *prima facie* showing had been made. When the prosecutor thereafter
 20 challenged female prospective juror L.W., defense counsel again objected, stating:

21 Your Honor, the defense is forced to renew its Batson-Wheeler
 22 motion, it’s now seven out of nine females that have been
 23 dismissed by the People, and the defense relies upon the sheer
 24 number, seven out of nine, to show a prima-facie case that the
 25 People must now explain all their female decision — “female
 26 decisions” is the wrong term, but all their thinking as to gender-
 27 neutral as to all seven. Defense feels a full Batson-Wheeler hearing
 28 must be held.

(10 ART¹⁰ 1860–61.) In response, the prosecutor merely stated that “a prima facie case of
 systematic exclusion based on gender has not been established.” (*Id.*) The trial court then ruled:
 “Out of an abundance of caution, I think that in my recollection of the earlier and current

¹⁰ “ART” refers to the Augmented Reporter’s Transcript of Testimony and Proceedings lodged by Respondent on
 October 25, 2021. (ECF No. 15.)

responses by [L.W.], find that a prima facie case has been shown.” (*Id.*) The prosecutor provided an explanation for striking L.W. After the explanation was provided, defense counsel stated:

Now that a prima facie case has been shown to [L.W.], I now believe that the defense is entitled to hear the gender-neutral explanations on all the females, because the Batson-Wheeler is not based just on [L.W.] or [K.G.]. It’s based on what the defense believes is a systematic exclusion of females as shown by the tally of seven out of nine.

(10 ART 1869.) The prosecutor responded that the state case cited by defense counsel “doesn’t sound to me like the new case changes the law. . . . I’m not hearing any more as far as the change in the law that each of the challenges has to be justified, and that I do not believe is the current state of the law.” (10 ART 1869–70.) The trial court then ruled that “[b]ased on [L.W.]’s responses today and when she initially came in, and based upon the totality of the circumstances and the arguments of counsel, I find that group-neutral, genuine non-discriminatory purpose was used in excusing [L.W.]. Respectfully deny the Batson-Wheeler challenge.” (10 ART 1870.)

The Court finds *Williams v. Carey*, No. C 05-2870 MHP (PR), 2007 WL 3105068 (N.D. Cal. Oct. 23, 2007), to be instructive.

Williams assert[ed] an interesting procedural claim about *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1988). He contend[ed] that, although the trial court denied his first objection to the peremptory strike of one juror for lack of a prima facie showing, the trial court was obliged to reconsider the striking of that juror when *Williams* later objected to the peremptory strike of a second juror as to which the court found that a prima facie case had been shown but, after hearing the prosecutor’s explanation, determined that no discriminatory purpose existed for striking the second juror.

Id. at *12. The district court denied relief, holding:

There also is no Supreme Court authority that requires that, where *Batson* motions are made seriatim, the trial court must consider anew a peremptory challenge it has already found had satisfied *Batson*. And there is no Supreme Court authority that the *Batson* analysis must be made of the group members en masse. Given this, the state appellate court’s rejection of *Williams*’ claim cannot be said to be contrary to or an unreasonable application of, clearly established Supreme Court authority, as it must be to justify habeas relief under § 2254(d).

Id. at *13. On appeal, the Ninth Circuit affirmed the district court, holding that “*Williams*’s

procedural claim regarding sequential *Batson* challenges has not yet been squarely addressed by the United States Supreme Court, so we must defer to the state court's resolution of the issue." Williams v. Haviland, 394 F. App'x 397, 398 (9th Cir. 2010) ("*Batson*'s general requirement that the trial court assess 'all relevant circumstances' in deciding whether a defendant has made a prima facie case for discrimination does not 'squarely address' the specific question whether a court must reconsider its denial of a *Batson* motion with regard to one juror if it subsequently finds a prima facie case of discrimination with regard to a different juror.").

Based on the foregoing, the Court finds that it was not objectively unreasonable for the state appellate court to find that the trial court concluded the defense had established a *prima facie* case only as to one juror, L.W., and thus, was not required to review all previously struck female prospective jurors. As fairminded jurists could disagree whether the state court's decision conflicts with the Supreme Court's precedents, the Court must defer to the state court's decision. Accordingly, Petitioner is not entitled to habeas relief on his fourth claim, and it should be denied.

V.

RECOMMENDATION

Accordingly, the undersigned HEREBY RECOMMENDS that the first amended petition for writ of habeas corpus be DENIED.

This Findings and Recommendation is submitted to the assigned United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within **THIRTY (30) days** after service of the Findings and Recommendation, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within fourteen (14) days after service of the objections. The assigned United States District Court Judge will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Wilkerson v.

1 Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th
2 Cir. 1991)).

3
4 IT IS SO ORDERED.

5 Dated: **August 17, 2022**

6 /s/ Eric P. Grogan
UNITED STATES MAGISTRATE JUDGE